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IN THE

Supreme Court of the United States

October Term, 1965

No. 514

EUGENE ALLEN DEUTSCH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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To: *The Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States.*

Eugene Allen Deutsch respectfully prays that a writ of certiorari issue to review the order of the Appellate Division of the Supreme Court of New York, First Judicial Department, entered on April 13, 1965, modifying, on the law, an order of the Supreme Court, New York County (DAVIDSON, *J.*), entered on January 2, 1964, denying his application for a writ of error coram nobis seeking to vacate a sentence of that court, dated July 10, 1962, and dismissing the proceeding.

Opinions Below

The order and opinion of the Appellate Division is not yet officially reported, but is reported in 258 New York Supplement, Second Series, 227. They are annexed hereto

as Appendix A and B. Petitioner had been granted leave to appeal to the Appellate Division *in forma pauperis* on the original record in the Supreme Court, New York County. Because the application to vacate the sentence was made on an affidavit sworn to by the attorney and not by the petitioner, The People of The State of New York moved to dismiss the appeal. The Appellate Division denied the motion with leave to renew upon the appeal. A timely application for leave to appeal to the Court of Appeals from the order of the Appellate Division was denied on June 3, 1965, by Judge Fuld. The certificate denying the motion recites that petitioner argued that his removal from the State of New Jersey for the purpose of imposing sentence in the State of New York was illegal and a violation of his rights to due process of law under the Fourteenth Amendment to the United States Constitution and thereby rendered his conviction and sentence in New York void and a nullity. The certificate is annexed hereto as Appendix C.

The order and unreported opinion of the Supreme Court, New York County (DAVIDSON, *J.*), denying petitioner's application to vacate a sentence of that court, dated July 10, 1962, are annexed hereto as Appendices D and E.

Jurisdiction

The order of the Appellate Division modifying the order denying petitioner's application to set aside the sentence, on the law, and dismissing the proceeding, was entered on April 13, 1965. On June 3, 1965, Judge Fuld of the Court of Appeals denied petitioner's motion for leave to appeal to the Court of Appeals from the aforesaid order of the Appellate Division. No application has been made for an enlargement of time to file the within Petition. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

Questions Presented

1. Whether the petitioner, a parolee in New Jersey, may challenge in the courts of New York the constitutionality of his sentence by a New York court which was imposed when he was removed under the Interstate Agreement on Detainers?

2. Whether the removal of the petitioner from the New Jersey State's prison under the Interstate Agreement on Detainers to the New York court for the purpose of imposing sentence was illegal and unlawful? If it is decided that the petitioner could be removed from the New Jersey State Prison to the New York court for the purpose of imposing sentence, then the following questions remain:

3. Whether the failure to inform the petitioner of his right to counsel when New York sought to remove him from prison was a violation of his constitutional rights to due process under the Fourteenth Amendment to the United States Constitution?

4. Whether denial of representation by counsel upon request by the petitioner at the proceedings before Judge Bennett of the County Court, in Mercer County, New Jersey was a violation of his constitutional rights to due process under the Fourteenth Amendment to the United States Constitution?

Constitutional and Statutory Provisions Involved

Section 669-b of the New York Code of Criminal Procedure, Sections 2A:159A-1 to A-15; 2A:166-16; 30:4-123. 15 of the New Jersey Statutes Annotated and the Fourteenth Amendment to the United States Constitution are pertinent and involved in this case. They are stated verbatim in Appendix F, hereto annexed.

Statement

The petitioner was indicted on October 23, 1958, in Ocean County, New Jersey, on six counts of forgery. He was indicted on July 9, 1959, in New York County, New York, on twenty-two counts of forgery in the second degree and six counts of grand larceny in the first degree. He pleaded not guilty to both indictments. The complainant in both cases was Walter E. Heller and Company, Incorporated, who accused petitioner with forging trade acceptances, schedules and invoices, thereby defrauding it of more than $1,000,000.00. On December 1, 1959, an Accusation containing twenty-eight counts, and identical with the twenty-eight count New York County indictment, was filed in Ocean County, to which the petitioner entered a plea of no contest. His application to withdraw that plea and to plea not guilty was denied. On February 11, 1960, he was sentenced to a term of not less than ten nor more than fifteen years on the first five counts of the Accusation and fined $1,000. on each of the remaining twenty-three counts. Upon appeal, the order denying leave to withdraw the plea of no contest and to plead not guilty was reversed with leave to renew the application upon a supplemental record. The prosecutor and the judge who denied the motion and imposed the sentence were brothers. The opinion of the Appellate Court is reported in 34 N. J. 190. However, there were no further proceedings based upon the Accusation. Instead the petitioner was put to trial on the six-count forgery indictment and convicted on November 13, 1961.

On December 8, 1961, he was sentenced to the New Jersey State Prison to concurrent terms of two to four years on each count and fined $12,000.00. Under New Jersey law upon failure to pay the fine he must remain in jail until it is paid or worked off at the rate of $5.00 per day (N. J. Stat. 2A:166-16). He was released on bail pending appeal from the judgment of conviction.

On December 21, 1961, the petitioner pleaded guilty in the Court of General Sessions (now the Supreme Court), New York County, to one count of forgery in the second degree and to one count of grand larceny in the first degree in satisfaction of all counts of the indictment. He was then represented by counsel. Sentencing was postponed from time to time until April 24, 1962, pending the petitioner's appeal from the judgment of conviction in New Jersey. The petitioner abandoned the appeal and commenced to serve his sentence on April 24, 1962, in the New Jersey State Prison in Trenton, New Jersey.

On April 26, 1962, a bench warrant was issued from the Court of General Sessions because he had not appeared for sentencing on April 24, 1962 which was forwarded to the New Jersey State Prison.

On April 27, 1962, an Assistant District Attorney of New York County made a written request for temporary custody of the petitioner for sentence and final disposition of the indictment pursuant to the Interstate Agreement on Detainers. The petitioner received a copy of that document from the Warden and was asked if he would waive extradition. On May 3, 1962, the petitioner advised the Warden he would not waive extradition upon advice of New York counsel to whom he had written concerning this matter, but to whom he had not sent a copy of the document. The statement in the opinion of Davidson, J. that this was sent to New Jersey counsel is erroneous.

Not until June 15, 1962, was the petitioner informed or advised of any further proceedings for his delivery to New York. He received a copy of a document described as an "offer to deliver temporary custody" signed by the Warden and sent to the New York County District Attorney agreeing to deliver him to New York "in order that speedy and efficient prosecution may be had of the indictment, information and complaint which is described in the annexed inmate's request". The petitioner promptly

notified the Warden in writing that he had previously refused, and still refused, to waive extradition. By that date the statutory time within which he could protest to the Governor had expired.

On July 9, 1962, without prior notice, the petitioner was brought before a judge of the County Court in Mercer County, at which the New Jersey Deputy Attorney General and an Assistant District Attorney of New York County appeared with a detective from the New York City Police Department. The petitioner was not represented by counsel. His repeated requests that his attorney be permitted to represent him and that the hearing be deferred until his attorney could appear were denied. Although no order was made at the termination of the hearing authorizing the petitioner to be delivered to New York, he was, nevertheless, immediately taken from the Courthouse to New York. The following day he was sentenced on one count of forgery in the second degree and on one count of grand larceny in the first degree in satisfaction of all counts in the indictment to concurrent terms of not less than three years nor more than six years to start at the expiration of his sentence in New Jersey. The petitioner was then represented by counsel. He was returned to the New Jersey State Prison the same day.

The federal questions involved in this case where raised in the motion the petitioner made in November, 1963, to vacate the sentence. He asserted he was illegally removed from State's Prison in New Jersey, unlawfully brought into the New York court and illegally sentenced in violation of due process of law and not in accordance with the Interstate Agreement on Detainers.

The petitioner filed a timely notice of appeal from the order denying the application to set aside the sentence but did not immediately perfect the appeal.

On January 30, 1964, the petitioner was paroled effective March 10, 1964, subject to the condition that "If you are

not able to pay the fine of $12,000 you will work it off in the institution at the rate of $5 a day."

On April 7, 1964, the New Jersey Parole Board rescinded the foregoing parole and granted a new parole effective March 10, 1964, subject to the following special condition:

> "You are paroled pursuant to the provisions of R.S. 30:4-123.15 on condition that you pay the fine imposed upon you by the payment of $250.00 thereof or working off such $250.00 in the institution at the rate of $5.00 per day. The remainder of the fine is to be paid at the rate of $100.00 per month to the Ocean County Probation Department, or in greater amount, if in the opinion of the Parole Board your earning capacity or any assets warrant same, and upon the further condition that you remain within the territorial limits of the State of New Jersey and upon the further condition that if any attempt is made to extradite you to another jurisdiction and if such attempt is successful that this parole will be revoked and you will be returned to confinement in New Jersey until such time as any balance remaining unpaid on said fine shall be worked off at the rate of $5.00 per day.
>
> STATE PAROLE BOARD
>
> Harold J. Ashby, *Chairman*
> Harold W. Hannold, *Associate Member*
> Thomas C. Swick, *Associate Member*"

cc: District # 6

Notwithstanding the granting of this parole the Warden of the New Jersey State Prison refused to release the petitioner because the State of New York had lodged a detainer against him. On April 10, 1964, the petitioner applied to the Superior Court of New Jersey for a Writ of Habeas Corpus, alleging that by reason of the conditions of the parole his confinement and detention was illegal and that he may not be surrendered to the State of New York until the accumulative fine of $12,000 is paid off while he remains in New Jersey under the jurisdiction and control of the New Jersey Bureau of Parole. A hearing was held before

Judge Barlow in the Superior Court of New Jersey. An Assistant District Attorney of New York County appeared on behalf of the State of New York and argued that the parole was illegal and unconstitutional in view of the detainer. Petitioner's attorney and the Deputy Attorney General of New Jersey argued that the conditions of parole was expressly authorized by N. J. S. 30:4-123.15; and that the fine was a part of sentence under sec. 2A:166-16 and decisional law. The writ was sustained on April 17, 1964, and the petitioner was ordered released.

At the hearing before Judge Barlow the New Jersey Deputy Attorney General represented to the Court: "I want to be certain, and I am going to ask the Parole Board, I am sure they will agree, to add to this parole condition that in no event shall these fines be paid off later than the day upon which he would have been surrendered had he been kept in confinement." In accordance with this representation the Parole Board on April 21, 1964, did change the parole so as to require the remainder of the fine to be paid upon petitioner's release at the rate of not less than $35 per week instead of at the rate of $100 per month or in any greater amount. The other special conditions of parole were not changed.

On August 24, 1964, the petitioner was arrested on an executive warrant issued by Governor Hughes upon the demand of Acting Governor Wilson, dated July 17, 1964, and brought before Hon. Jacob S. Glickenhaus, in the County Court of Essex County, in Newark, New Jersey, on August 26, 1964, at which time he was released on $5,000 bail. The hearing in the extradition proceeding has been adjourned from time to time and arrangements have been made by the Governors that the extradition proceedings will be held in abeyance until there is an adjudication by the courts of the legality of the sentence.

As a direct result of the petitioner's arrest on the warrant of extradition he faces confinement in the New Jersey State Prison until the balance of his fine is paid

off at the statutory rate of $5.00 per day. For on August 26, 1965, the Parole Board revoked parole:

> "because, by the terms of the Parole granted herein, it was provided that 'If any attempt is made to extradite you to another jurisdiction and if such attempt is successful that this parole will be revoked and you will be returned to confinement in New Jersey.' The Parole Board is informed by the Governor of New Jersey that the demand of the State of New York for your extradition to New York has received Executive approval, the Governor has executed his warrant and you are in confinement, or on bail, as a result thereof."
>
> "This Revocation shall become effective immediately upon the rendering of a decision by an appropriate court of competent jurisdiction in New Jersey that you are a fugitive from the State of New York. Therefore, you will be returned to confinement at the State Prison in accordance with the terms and conditions of the Parole granted you."

At the present time there remains the sum of $9,440.00. Consequently, the petitioner may be confined until November 4, 1970. To avoid this result the attack against the sentence became imperative. The appeal to the Appellate Division was promptly prosecuted.

Upon the appeal, the petitioner pressed the federal questions urged in the Court below and that the Interstate Agreement on Detainers could not be invoked for the purpose of imposing sentence. The Appellate Division did not decide the appeal upon the merits, but dismissed the proceeding because "so long as the defendant does not submit himself to the jurisdicition he is not entitled to seek relief from the court (*People* v. *Genet*, 59 N. Y, 80, see *People* v. *Del Rio*, 14 N. Y. 2d 165, 169, 250 N. Y. S. 2d 257, 199 N. E. 2d 359, 361; *cf. Allen* v. *State of Georgia*, 166 U. S. 138, 17 S. Ct. 525, 41 L. Ed. 949").

Upon application to Judge Fuld for leave to appeal to the Court of Appeals, petitioner argued that the dis-

missal of the proceedings by the Appellate Division constituted an additional and further denial of due process because he was being deprived of the right to contest an illegal sentence due to his inability to submit to the jurisdiction of New York by reason of the condition of his parole which requires him to remain at all times in New Jersey.

Reasons for Granting the Writ

There are several important reasons why the Writ of Certiorari should be granted.

1. The New York court improperly acquired jurisdiction of the petitioner. The Interstate Agreement on Detainers does not authorize a transfer of a prisoner from one State to another State for the sole purpose of sentencing. It only sanctions a transfer of a prisoner for "trial" when there is pending against him any "untried indictment, information or complaint".

The policy and purpose is enunciated in the following words:

> "The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried, indictments, informations or complaints.* * *"

Quite plainly when the petitioner pleaded guilty to the indictment there no longer was any "open indictment, information or complaint". Sentencing is not part of any untried indictment, information or complaint. "Sentencing is the entry of judgment in a criminal case." *People ex rel. Harty* v. *Fay*, 10 N. Y. 2d 274.

The duty of the district attorney to complete criminal proceedings by causing sentence to the imposed, as expressed by Judge Davidson, is not questioned. The apprehension that undue delay in imposing sentence upon a defendant who is incarcerated in another State may cause the court to lose jurisdiction under *Peo. ex rel. Harty* v. *Fay, supra*; and *People* v. *Winfray*, 44 Misc. 2d 140, affords no basis for invoking the Interstate Agreement on Detainers. The State has other remedies. It does not have to wait until the defendant finishes his sentence in another State and take the risk that the defendant will go unpunished because the court may decide that the delay caused it to lose jurisdiction. One method by which such a defendant may be brought into the state for sentencing is extradition. Unlike the Interstate Agreement on Detainers, the Uniform Extradiction Act, to which New York and New Jersey are parties, expressly authorizes this procedure where a defendant is sought for sentencing. New York Code Crim. Proc. Sec. 832; N. J. Stat. 2A-160-33.

The other method is by executive agreement. For as a matter of comity, the executive authorities may agree that a prisoner who is serving a sentence will be surrendered for either trial or sentencing on condition that the prisoner be returned to complete his prior sentence, without either state waiving jurisdiction. *Pozni* v. *Fessenden*, 258 U. S. 254; *Haywood* v. *Looney* (10th Cir. 1957), 246 F. 2d 56; *Rau* v. *McCorkle*, 45 N. J. Super. 36, 135 Atl. 2d 224.

In the Appellate Division the People contended, and will doubtless repeat the argument, that even if it be assumed that the statute is inapplicable and that the petitioner was improperly brought into New York, he could, nevertheless, be sentenced, citing *Ker* v. *Illinois*, 119 U. S. 519 (1886) and *Frisbie* v. *Collins*, 342 U. S. 519 (1952). In *Ker* it was stated that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the Court". In *Frisbie* it was

stated, "This court has never departed from the rule announced in *Ker* v. *Illinois* that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the Court's jurisdiction by reason of a 'forcible abduction'. No persuasive reasons are now presented to justify overruling this line of cases. They rest on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will."

In light of broadened concepts of due process as spelled out by the more recent decisions of this Court a strong case can be made for the rejection of the rule that due process of law is not violated by State prosecution of an accused whose presence in the jurisdiction is involuntary and brought about by illegal or unlawful means and that a court will not concern itself or inquire into the manner of the procedure by which he was brought into the jurisdiction for trial as announced in *Ker* and *Frisbie*. If a State may not secure a conviction by illegally seized evidence, or by a coerced confession, or of one who is refused or denied counsel at crucial stages of the proceedings, or by improperly obtained admissions, or by compulsory self-incriminating evidence, because such action by a State does not accord with fundamental principles of justice, the same consideration of "justice" should deny to a State the right to put one to trial if he was brought into the State illegally and unlawfully.

Even if *Ker* and *Frisbie* are not overthrown, the principle of those cases does not apply to the case at bar. The stated underlying reason for the rule is that a guilty person rightfully convicted ought not be permitted to

escape justice. But one who has pleaded guilty and is a prisoner in another State cannot evade punishment. The State can always reach out at the termination of his incarceration and obtain jurisdiction for the imposition of sentence. Where the reason for the rule does not apply, the rule should not be invoked.

2. Even if the Interstate Agreement on Detainers is applicable, the petitioner was not accorded due notice and the right to counsel, and was thereby denied due process. Art. IX, subd. 7 of Sec. 669-b of the New York Code of Criminal Procedure requires that the prisoner shall be advised in writing of his rights to counsel, to make representations to the governor within thirty days, and to contest the legality of his sentence. Although the New Jersey statute has no such provision, it, among other things, provides that where a State seeks temporary custody.

> "there shall be a period of thirty days after receipt by the appropriate authorities before the request is honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner. Art. IV(a)".

This must be read in conjunction with subd. d of Art. IV:

> "Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery."

To make the "motion" the petitioner had to have timely notice that such a request had been forwarded to the Governor. He was never apprised of this. The copy of the "Request For Custody" given to the petitioner on April 29, 1962, contained no such notice. Although by

letter, dated May 4, 1962, the Warden of the State's Prison in New Jersey was advised that as provided by Art. IV(a) the Governor's office should be notified of the Request For Custody so that they may disapprove transfer if they desire either on the Governor's own motion or on motion of the petitioner, and although the Warden so notified the Governor by letter, dated May 11, 1962, the petitioner was not given any notice. Without notice, how could the petitioner "move" before the Governor not to honor the request?

It is equally clear from the statute as a whole that notice is an essential part of "due process" and that a prisoner should be accorded the right to counsel, to make representations to the Governor within thirty days, and to contest the legality of his delivery. These are not mere "procedural irregularities" as stated by Judge Davidson; they are of the essence of "due process". By the New York statute these rights are explicitly provided; they are implicit in the New Jersey statute.

The record shows that the petitioner was denied representation by counsel and an adjournment of the hearing before Judge Bennett in order that his New Jersey attorney might be present in flagrant violation of his statutory right to contest the legality of his delivery to New York and in violation of constitutional due process. Judge Bennett was persuaded to conclude that the petitioner was not entitled to counsel and not entitled to a hearing. He was plainly wrong. The statute provides that a prisoner may oppose transfer by motion to the Governor within thirty days after receipt of a request for temporary custody *and* in addition may contest the legality of his delivery. Apparently the prison authorities and those responsible for the supervision of proceedings undertaken pursuant to the Interstate Agreement recognized that even after the expiration of the thirty day period legal proceedings would have to be employed by the State in order to secure

his transfer. This is evident from the written "Offer to Deliver Temporary Custody", dated June 14, 1962, which states, "If proceedings under Article IV(a) of the agreement is indicated, an explanation is attached. (Subject will not waive extradition.)"

The right to contest the legality of his delivery of necessity implies the right to resort to a court for relief with the assistance of counsel. The only limitation imposed is that delivery may not be opposed on the ground that the Governor has not affirmatively consented or ordered such delivery.

In view of the language in the statute a denial of the right to a hearing and to assistance by counsel constitutes a denial of due process. This is well established by the right-to-counsel cases in this Court. In *Powell* v. *Alabama*, 287 U. S. 45, this Court said the right to counsel during critical periods of the proceedings "that is to say, from the time of the arraignment until the beginning of that trial, when consultation, thorough-going investigation and preparation (are) vitally important, the defendants (are) as much entitled to such aid (of counsel) during that period as at the trial itself."

Gideon v. *Wainwright*, 372 U. S. 335, holds that the Sixth Amendment's guarantee of counsel in criminal prosecutions mandates that indigent defendants in criminal cases in State courts must have counsel appointed as "a fundamental right, essential to a fair trial." There is no need to demonstrate that a defendant has been disadvantaged, or that prejudice resulted, by the absence of counsel. *Hamilton* v. *Alabama*, 368 U. S. 52; *White* v. *Maryland*, 373 U. S. 59. However, in this case the petitioner was disadvantaged and prejudiced. Petitioner's counsel could have contended and argued that the petitioner had a right to contest the legality of delivery notwithstanding the mere lapse of thirty days within which the Governor could disapprove the request for temporary custody and that

this required a judicial—not an executive—hearing, as the New Jersey Deputy Attorney General and the Assistant District Attorney of New York argued. At the hearing counsel could have then contended and argued that the Interstate Agreement on Detainers was inapplicable. The petitioner could not be expected to make these legal arguments. He voiced himself as follows:

> "I would like, your Honor, to give me the benefit of having my attorney present at the hearing. I am being asked now to act as my attorney, and some of things these gentlemen have said I don't fully understand. I would appreciate it if you would have a hearing and have my attorney present to have him say what he wants to say about the situation."

The reason for a layman's need for a lawyer is best expressed in *Williams* v. *Kaiser,* 323 U. S. 471:

> "A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutor, of the law's complexity, or of his own ignorance or bewilderment."

The Sixth Amendment guarantee to counsel in State criminal trials is not limited to the time of arraignment and trial but applies to pre-arraignment proceedings. In *Escobedo* v. *Illinois,* 378 U. S. 478, it was held that where "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, and has been denied an opportunity to consult with his lawyer, * * * the accused has been denied 'the Assistance of Counsel in violation of the Sixth Amendment to the Constitution made obligatory upon the States by the Fourteenth Amendment' * * *".

This Court has never expressly held that a convicted defendant in a State court has a constitutional right to the assistance of counsel in a post-conviction proceeding, but

this is implicit in *Fay* v. *Noia,* 372 U. S. 391 and *Townsend* v. *Sain,* 372 U. S. 293. However, as early as 1949, this Court in *Young* v. *Ragen,* 337 U. S. 235, held that the State must afford prisoners some "clearly defined method by which they may raise claims of denial of federal rights." To the same effect: *Carter* v. *Illinois,* 329 U. S. 173; *Mooney* v. *Holohan,* 294 U. S. 103. Where hearings in such proceedings are granted, it is tried in open court, without a jury, and the right of counsel and cross-examination is afforded to both sides. *People* v. *Richetti,* 302 N. Y. 290; *People* v. *Langan,* 303 N. Y. 474. Note, "State Post-Conviction Remedies and Federal Habeas Corpus, 40 N. Y. U. L. R. 154 (1965).

It is submitted that upon the same considerations and the same rationale that mandate the right to assistance of counsel on constitutional grounds to one who is the specific target of investigation by the police, or to one who is arraigned or to one who is put to trial, or to a defendant in a post-conviction proceeding who attacks the judgment of conviction or sentence, an inmate who is sought to be removed from the prison of one State and brought into another for trial or sentence and who has the right to contest the legality of such removal, ought to have the same right to counsel. A denial of such right is a denial of due process.

3. The dismissal of the proceedings by the Appellate Division because the petitioner had not submitted himself to the jurisdiction of the Court was in deprivation of his constitutional right to due process and equal protection of law. Since New York accords to a convicted defendant the right to seek relief by coram nobis, the question in this case is whether the petitioner who is not free to come into New York may institute such a proceeding while he is under parole in another jurisdiction. The Appellate Division held he could not. The cases are clearly inapposite; in each the defendant voluntarily absented him-

self from the jurisdiction. In *Allen*, 166 U. S. 138, as in *Genet*, 59 N. Y. 80, the defendant filed an appeal and fled the jurisdiction. The courts held that an absconding appellant may not have his appeal heard. In *Allen* it was held that to deny such a defendant the right to have his appeal heard is not a denial of due process. The reason for the rule is expressed as follows in *Commonwealth* v. *Andrews*, 97 Mass. 543, cited and followed in *Del Rio*, 14 N. Y. 2d 165:

> "A hearing would avail nothing" because "if a new trial should be ordered, he is not here to answer further."

In *Del Rio* the defendant's sentence was commuted and he was released from prison under an agreement that he would go to Cuba and never again enter the United States. While in Cuba he wanted the appeal from his judgment of conviction heard. The Court of Appeals dismissed the appeal because "he must be held to have abandoned the appeal and deliberately to have waived and foregone his right to have the appeal heard and decided."

Here, however, the petitioner did not flee. Even if he wanted to submit to the jurisdiction of New York he cannot.

The petitioner in this case is in substantially the same situation as was Jones in the case of *Jones* v. *Cunningham*, 371 U. S. 236. Jones had been convicted in a Virginia Court and while in prison sued out a writ of habeas corpus. The District Court dismissed the proceeding but the Court of Appeals granted a certificate of probable cause and leave to appeal *in forma pauperis*. Shortly before his appeal came on to be heard he was paroled and directed to live with relatives in Georgia. Upon motion by the Superintendent of the Virginia State Prison, who was the only respondent, the appeal was dismissed as moot. This Court decided that a parole is still in custody and could therefore

sue out a writ of habeas corpus. The Court expressly rejected the argument that the District Court had no jurisdiction because he had left the territorial limits of the district, citing *Ex parte Endo*, 323 U. S. 283, which had held that "a District Court did not lose its jurisdiction when a habeas corpus petitioner was removed from the district so long as an appropriate respondent with custody remained".

We submit that the holding by the Appellate Division is contrary to the principle of *Jones*. Unless petitioner is accorded the right to have his appeal heard on the merits he will have to go back to the Jersey State Prison and remain there until November 5, 1970 only because he is unable to come to New York, whereas if he is permitted to attack the sentence, he may succeed and avoid such a result. In justice, he ought not be denied this opportunity.

CONCLUSION

For the foregoing reasons the Court should grant certiorari, summarily reverse the order of the Appellate Division and direct the Appellate Division to vacate the sentence. If summary reversal is not granted, the petition for certiorari should be granted.

Respectfully submitted,

GEORGE J. MALINSKY,
Counsel for Petitioner.

Appendix A

(Order of Modification by Appellate Division)

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 13th day of April, 1965.

Present:

Hon. Bernard Botein,
Presiding Justice,
" Charles D. Breitel,
" Benjamin J. Rabin,
" James B. M. McNally
" Aron Steuer,
Justices.

8531

The People of the State of New York,
Respondent,

vs.

Eugene Allen Deutsch,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 2nd day of January, 1964, denying defendant's application for a writ of error coram nobis, and said appeal having been argued by Mr. George J. Malinsky of counsel for the appellant, and by Mr. Eric A. Seiff of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

Appendix B

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, so as to dismiss the proceeding.

Enter:

VINCENT A. MASSI,
Clerk.

Appendix B

(MEMORANDUM–DECISION OF APPELLATE DIVISION)

E. A. SEIFF, New York City, for respondent.
G. J. MALINSKY, New York City for defendant-appellant.

Before:

BOTEIN, *P. J.*, and BREITEL, RABIN, MCNALLY and STEUER, *JJ.*

Per curiam.

[1, 2] Order, entered on January 2, 1964, denying an application for a writ of error coram nobis, unanimously modified, on the law, so as to dismiss the proceeding. There is no warrant for a proceeding of this character. Moreover, so long as the defendant does not submit himself to the jurisdiction he is not entitled to seek relief from the court (People v. Genet, 59 N. Y. 80; see People v. Del Rio, 14 N. Y. 2d 165, 169, 250 N. Y. S. 2d 257, 260, 199 N. E. 2d 359, 361; cf. Allen v. State of Georgia, 166 U. S. 138, 17 S. Ct. 525, 41 L. Ed. 949). Order filed.

Appendix C

(Certificate Denying Leave to Appeal)

COURT OF APPEALS

State of New York

Before:

Hon. Stanley H. Fuld, *Associate Judge.*

The People of the State of New York,

Respondent,

against

Eugene Allen Deutsch,

Defendant-Appellant.

I, Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that the abovenamed appellant, within the time and in the manner prescribed by section 520 of the Code of Criminal Procedure, duly presented to me an application for a certificate that questions of law were involved in the above matter which ought to be reviewed by the Court of Appeals. In such application, seeking leave to appeal from an order of the Appellate Division, First Department, made and entered on or about the 13th day of April, 1965, modifying an Order of the Supreme Court, New York County (Davidson, J.), dated January 2, 1964, denying appellant's motion for a writ of error coram nobis seeking to vacate a conviction and sentence of that court, dated July 10, 1962, and

dismissing the proceeding, it was argued that the removal of appellant from the State of New Jersey for the purpose of imposing sentence in the State of New York was illegal and a violation of his rights to due process of law under the Fourteenth Amendment to the Constitution of the United States and thereby rendered his conviction and sentence in this State void and a nullity.

After due consideration, and upon the record and proceedings herein, I denied the application because, in my opinion, no question of law is involved justifying review by the Court of Appeals.

Dated at New York, New York, June 3, 1965.

/s/ Stanley H. Fuld,
Associate Judge.

Appendix D

(Order of Special and Trial Term of Supreme Court, New York County)

Ind. No. 2620/59

At a Special and Trial Term Part XXX of the Supreme Court of the State of New York held in and for New York County on the 2nd day of January, 1964.

Present:

Hon. Irwin D. Davidson,
Justice.

The People of the State of New York

against

Eugene Allen Deutsch,
Defendant.

The following papers read and proceedings had on this motion:

1. The notice of motion returnable November 18, 1963 and the affidavit of George J. Malinsky, Esq. sworn to on October 3, 1963 together with exhibits attached thereto in support of said motion;

2. The indictment together with the endorsements thereon and attached thereto bearing number 2620/59;

3. The minutes of pleading of December 21, 1961;

4. The minutes of sentence of July 10, 1962;

5. The affidavit of Oscar J. Cohen, Assistant District Attorney, sworn to on November 15, 1963;

And the District Attorney opposing the motion;

Now on filing the decision of this Court dated December 2, 1963, denying the motion;

Upon the foregoing papers and proceedings, and after due deliberation, it is

ORDERED that the defendant's motion to vacate the judgment herein be, and the same hereby is, denied.

Enter

IRWIN D. DAVIDSON,
Justice of the Supreme Court.

Dated: New York, N. Y., January 2, 1964.

Appendix E

(Opinion of Davidson, *J.* at Special and Trial Term of Supreme Court, New York County)

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

Special and Trial Term—Part XXX

No. 2620-1959

The People of the State of New York

against

Eugene Allen Deutsch,

Defendant.

The defendant moves to vacate and set aside a judgment of conviction upon his plea of guilty to two felony counts entered July 10, 1962 pursuant to which he was sentenced to State's Prison for a term of not less than three nor more than six years, that term of imprisonment to start at the conclusion of the defendant's incarceration in New Jersey's State Prison.

The defendant contends that he was illegally removed from State's Prison in New Jersey, unlawfully brought into our court of General Sessions (now the Supreme Court), and illegally sentenced in violation of his constitutionally protected rights and not in accordance with the interstate "Agreement on Detainers."

The defendant was indicted in New York County in a twenty-eight count indictment filed July 9, 1959. On December 21, 1961 he pleaded guilty to two of its counts:

forgery in the second degree and grand larceny in the first degree.

On November 13, 1961, prior to his plea of guilty in New York, the defendant was convicted after trial in the County Court of Ocean County, New Jersey, on a six-count forgery indictment. On December 8, 1961 he was sentenced to the New Jersey State Prison for a term of two to four years on each count to run concurrently. The defendant was released on bail in New Jersey pending an appeal from his conviction to the Superior Court of New Jersey.

The defendant's sentence in New York had been postponed from time to time at his request, the last postponement being to April 26, 1962, pending determination of his New Jersey appeal. For reasons best known to himself, and before sentence was imposed on him in New York, the defendant abandoned his New Jersey appeal and surrendered himself to that State to start serving a two-to-four year sentence. On April 26, 1962, the day set for imposition of sentence on his New York conviction, the defendant, having surrendered himself in New Jersey, failed to appear; and a bench warrant was issued and forwarded to the New Jersey State Prison Authorities.

In order to complete the unfinished case in New York, the District Attorney commenced proceedings to bring the defendant here from New Jersey in temporary custody for the purpose of imposing the New York sentence. Under Section 473 of our Code of Criminal Procedure, if the conviction be for a felony, a defendant must be personally present at the time judgment is imposed. Entry of the judgment was required to complete the case. *Eighmy* v. *The People*, 78 N. Y. 330. Imposition of sentence after conviction is a final judgment. *Manke* v. *The People*, 74 N. Y. 415. Furthermore, an appeal in a criminal case lies from a final judgment only (Section 517 C. C. P.). *People* v. *The Warden*, 139 App. Div. 488, affd. 202 N. Y. 138; *People* v. *Reed*, 276 N. Y. 5. In addition, it has been held

that a delay in imposing sentence may cause the court to lose jurisdiction. *People ex rel. Harty* v. *Fay*, 10 N. Y. 2nd 274. Whether this ruling extends to a prisoner who is confined in a neighboring jurisdiction may be questionable. However, it was the duty of the District Attorney to complete the proceedings in New York by causing sentence to be imposed in New York. In order to do so, the District Attorney forwarded to the New Jersey prison authorities a request for temporary custody of the defendant.

A copy of this request was sent to the defendant; and he in turn forwarded it to his New Jersey attorney. On May 3, 1962, the defendant, on advice of counsel, informed the New Jersey prison authorities that he would refuse and would fight extradition for such purpose. On May 11, 1962, the New Jersey prison authorities sent to the Governor of New Jersey the District Attorney's request for temporary custody of the defendant, at the same time informing the Governor that the defendant was unwilling to be transferred to New York.

More than thirty days having thereafter elapsed, and the Governor of New Jersey not having disapproved the request for such temporary custody, the prison authorities advised the defendant that they intended to honor the request and transfer him to New York. (N. J. Stat. Ann. Title 2A, 159A-4, A-12.)

Apparently because of the defendant's persistence in his determination to resist his enforced return to the State of New York for the imposition of sentence, a Deputy Attorney General for the State of New Jersey convened a proceeding before Judge Clifton C. Bennett, Judge of Mercer County Court, on July 9, 1963. In that proceeding the defendant was not represented by an attorney. However, Judge Bennett concluded that the interstate "Agreement on Detainers" provided for proceedings at the executive level, i.e., before the Governor. He denied defendant's request for a further postponement of his transfer to

New York in order that his New Jersey attorney might be present; and the Judge indicated that counsel would add nothing since the court was not the place where counsel's argument should be made, but rather that the argument against the return to New York should be addressed to the Governor of New Jersey.

In due course, the defendant was brought to New York; and, on July 10, 1962, the New York sentence was imposed. At the time of sentence the defendant was represented by New York counsel who offered no legal objection to its imposition. Thereafter the defendant was returned to the New Jersey State Prison in conformity with the interstate compact.

The defendant now urges that he was not given written notice by the New Jersey prison authorities of his right to counsel, to make representations to the Governor within thirty days, and to contest the legality of his delivery. While such an obligation is imposed upon the prison authorities in New York (See Section 669b of the Code of Criminal Procedure, Art. 9, par. 7), no such obligation is imposed by the New Jersey statute upon its prison authorities. (See N. J. Stat. Ann. Title 2-A; 159A-1 to A-15.) Apparently under New Jersey law the obligation of moving before the Governor to resist a transfer in accordance with a request for temporary custody devolves on the prisoner.

Pursuant to the "Agreement on Detainers" (Article IV (a)): "The governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner." The defendant, having been duly notified by the New York authorities of the request for temporary custody pursuant to such Article, and having indicated to the New Jersey prison authorities that he would resist extradition, it was incumbent on him to move before the Governor for any desired relief. Upon what grounds such a request would be based, remains completely obscure. Defendant's papers

fail to set forth any reason why he should not have been transferred to New York. Having failed to move before the Governor of New Jersey, and the necessary time having elapsed, the defendant may not now be heard to complain on constitutional grounds (that he was deprived of counsel in New Jersey) that the New Jersey authorities honored the New York request and transferred him here for the imposition of sentence.

If any defect in procedure occurred in New Jersey in the transfer of the defendant to New York, such defect would not vitiate or affect the defendant's prior plea of guilty to the New York indictment. Any alleged procedural irregularity in New Jersey would, at best, entitle the defendant to vacatur of the sentence imposed upon him in New York. But this would accomplish nothing more than to require the District Attorney of New York to proceed *de novo* with a request to the New Jersey Governor for temporary custody for the imposition of the New York sentence.

In any event, no valid reason has been given as to why the New Jersey Governor should refuse to honor the District Attorney's request for temporary custody. But even were the Governor of our Sister State to refuse the request, it would avail the defendant nothing. In such unlikely event, the defendant would complete his term of imprisonment in New Jersey and thereafter he would be delivered to our own authorities on a New York bench warrant for the imposition of sentence.

The motion is in all respects denied.

IRWIN D. DAVIDSON,
J. S. C.

Dated: December 2, 1963.

Appendix F

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK CODE OF CRIMINAL PROCEDURE, SEC. 669-b

Agreement on Detainers

Sec. 669-b

1. The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

Text of the Agreement on Detainers

The contracting states solemnly agree that:

ARTICLE I

The party states find that charges oustanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings

with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such co-operative procedures.

ARTICLE II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

ARTICLE III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer had been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint; pro-

vided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of correction or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of correction or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of correction or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which

the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement.. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

ARTICLE IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has

lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served; the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

ARTICLE V

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for

trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

ARTICLE VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be

tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

ARTICLE VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

ARTICLE VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

ARTICLE IX

1. This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United

States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

2. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean any court with criminal jurisdiction.

3. All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purposes.

4. Escape from custody while in another state pursuant to the agreement on detainers shall constitute an offense against the laws of this state to the same extent and degree as an escape from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provisions of the agreement on detainers and shall be punishable in the same manner as an escape from said institution.

5. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

6. The governor is hereby authorized and empowered to designate an administrator who shall perform the duties and functions and exercise the powers conferred upon such person by Article VII of the agreement on detainers.

7. In order to implement Article IV(a) of the agreement on detainers, and in furtherance of its purposes, the appropriate authorities having custody of the prisoner shall, promptly upon receipt of the officer's written request, notify the prisoner and the governor in writing that a request for temporary custody has been made and such notification shall describe the source and contents of said request. The authorities having custody of the prisoner shall also advise him in writing of his rights to counsel, to make representations to the governor within thirty days, and to contest the legality of his delivery. Added L. 1957, c. 524, sec. 1, eff. Sept. 1, 1957.

Chapter 159A.

INTERSTATE AGREEMENT ON DETAINERS

Agreement on Detainers

2A:159A1 The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy

of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

2A:159A-2. DEFINITIONS.

Article II

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III [N. J. S. Cum. Supp. 2A:159A-3] hereof or at the time that a request for custody or availability is initiated pursuant to Article IV [N. J. S. Cum. Supp. 2A:159A-4] hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

Appendix F

2A:159A-3. TRIAL, CONTINUANCE: NOTICE AND REQUEST BY PRISONER; WAIVER OF EXTRADITION.

Article III

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint: provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final

disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement, nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

2A:159A-4. Request for Temporary Custody or Availability; Action by Governor; Commencement of Trial.

Article IV

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) [N. J. S. Cum. Supp. 2A:159A-5(a)] hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this article [section], trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(e) [N. J. S. Cum. Supp. 2A:159A-5(e)] hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

Appendix F

2A:159A-5. OFFER TO DELIVER TEMPORARY CUSTODY; ACCEPTANCE.

Article V

(a) In response to a request made under Article III [N. J. S. Cum. Supp. 2A:159A-3] or Article IV [N. J. S. Cum. Supp. 2A:159A-4] hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given.

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint

on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in 1 or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the

same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the 1 or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

2A:159A-6. Running of Time Periods, Persons Mentally Ill Unaffected.

Article VI

(a) In determining the duration and expiration dates of the time periods provided in Articles III [N. J. S. Cum. Supp. 2A:159A-3] and IV [N. J. S. Cum. Supp. 2A:159A-4] of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

Appendix F

2A:159A-7. Officer Designated to Promulgate Rules and Regulations; Information.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

2A:159A:8. When Agreement Efeective; Withdrawal by State.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

2A:159A-9. Construction of Agreement; Severability.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States

or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

2A:159A-10. "Appropriate Court" Defined. The phrase "appropriate court" as used in the agreement on detainers shall, with reference to the courts of this state, mean any court with criminal jurisdiction.

2A:159A-11. Enforcement of Agreement; Cooperation. All courts, departments, agencies, officers and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with the other party states in enforcing the agreement and effectuating its purposes.

2A:159A-12. Duty of Warden. The warden or other official in charge of any penal or correctional institution in this state shall give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

2A:159A-13. Effect of Escape from Custody. Escape from custody while in another state pursuant to the agreement on detainers shall constitute an offense against the laws of this state to the same extent and degree as an escape from the institution in which the prisoner was confined immediately prior to having been sent to another state pursuant to the provisions of the agreement on detain-

ers and shall be punishable in the same manner as an escape from said institution.

2A:159A-14. Designation of Central Administrator and Information Agent. Pursuant to said agreement, the governor is hereby authorized and empowered to designate an officer or alternate who shall be the central administrator of and the information agent for the agreement on detainers and who, acting jointly with like officers of other party states, shall have power to formulate rules and regulations to carry out more effectively the terms of the agreement, and shall serve subject to the pleasure of the governor.

2A:159A-15. Secretary of State to Transmit Copies of Act. Duly authenticated copies of this act [chapter] shall, upon its approval, be transmitted by the secretary of state to the governor of each state, the attorney-general and the administrator of the general services administration of the United States, and the council of state governments.

2A:166-16. Defendant Confined for Failure to Pay Fines and Costs; Credits; Discharge.

Whenever it shall appear that a person is confined in a State penal or correctional institution by reason of default in the payment of fines and costs of prosecution and wherein the committing court, as a part of the sentence of imprisonment, ordered that the prisoner stand committed until such fine and costs are paid, such prisoner shall be given credit against the amount of such fines and costs at the rate of $5.00 for each day of such confinement. When the prisoner shall have been confined for a sufficient number of days to establish credits equal to the total aggregate amount of such fines and costs, and is not held by reason of any other sentence or commitment, he shall be dis-

charged from imprisonment by the chief executive officer of the state penal or correctional institution wherein he is so confined.

30:4-123.15 Terms and Conditions of Parole; Legal Custody; Payment of Fine and Costs.

If the board shall determine that a prisoner is eligible for parole then he may be released, upon such terms and conditions as the board shall prescribe, but while on parole shall at all times remain in the legal custody of the warden, keeper or chief executive officer of the institution from which he is paroled, and under immediate supervision of the Division of Parole of the Department of Institutions and Agencies in accordance with the rules of the board, until the expiration of the maximum sentence prescribed by law for the crime for which he was committed, and until payment has been made of any fine and costs imposed upon such prisoner, in the manner directed by the board as a condition of parole.

If an inmate is eligible for release on parole as otherwise provided for in this act or has served the maximum term of his sentence but is required to remain in confinement because of failure to pay a fine and costs imposed upon him, the board may release such inmate on parole upon condition that such fine and costs be paid, through the probation officer of the county from which the inmate was committed, in weekly amounts to be fixed by the board. Failure to pay such fine and costs in the manner directed by the board shall constitute sufficient cause for revocation of parole and upon such revocation and return to confinement the inmate shall not be releeased until said fine and costs are paid, remitted or worked out as provided in section 2A:116-16 of the New Jersey Statutes. L. 1948, c. 84, p. 485, § 15; L. 1954, c. 223, p. 836, § 1; L. 1960, c. 49, p. 429, § 1.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 514

EUGENE ALLEN DEUTSCH,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the Appellate Division, Supreme Court of the State of New York, First Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to the Appellate Division of the Supreme Court, First Judicial Department, to review an order of that court which dismissed petitioner's application for a writ of *coram nobis*, thereby modifying, on the law, an earlier order of the Supreme Court,

New York County, which had denied the same petition on the merits. The *coram nobis* petition in issue sought to vacate petitioner's plea of guilty, and sentence thereon, to the crimes of FORGERY IN THE SECOND DEGREE (New York Penal Law §887) and GRAND LARCENY IN THE FIRST DEGREE (New York Penal Law §§1290, 1295). The sentence on each charge was a concurrent term of not less than three years nor more than six years in State Prison. Currently on parole in New Jersey, the petitioner has not yet served his New York sentence.

Questions Presented

1. Whether petitioner's *coram nobis* application may be considered on the merits.

2. Whether the *nisi prius* court had jurisdiction to impose sentence.

Statement of the Case

On July 9, 1959, a twenty-eight count indictment was filed by a New York County Grand Jury charging the petitioner with uttering forged documents and stealing over half a million dollars from Walter B. Heller & Company (Ind. #2620/59).

Petitioner pleaded guilty to one count of first degree grand larceny and one count of second degree forgery on December 21, 1961; he was sentenced on July 10, 1962, to concurrent terms of from three to six years after the court learned that the theft of over one million dollars was never

recovered (mins. of plea, pp. 2-3; mins. of sent., pp. 9, 13-14).

At the same time that these proceedings were taking place in this state, the petitioner was also being prosecuted in New Jersey for related criminal activity. After pleading no contest and then subsequently obtaining appellate court assistance in withdrawing that plea after the trial court refused to permit it [34 N. J. 190, 168 A. 2d 12], petitioner was found guilty after a jury trial in the County Court of Ocean County on November 13, 1961 (October 31, 1963, affid. of George Malinsky, pp. 2-3). On December 8, 1961, he was sentenced on each of six counts of forgery to concurrent terms of from two to four years and fined a total of twelve thousand dollars (*id.* p. 3). He never prosecuted an appeal from that judgment and had actually started serving his prison term when he was brought to New York City for one day, pursuant to an interstate detainer agreement, to receive the above-noted New York sentence (*id.* pp. 4, 9). Thus, his sentence in this state does not commence until after he has served his time in New Jersey (*id.* p. 10).

Early in 1964, the petitioner was paroled in New Jersey with the stipulation that he pay off his twelve thousand dollar fine at the rate of one hundred dollars a month. Curiously, there was attached the proviso that not only must petitioner remain within the confines of New Jersey during this probationary period—which amounts to ten years—but if New York be successful in extraditing him, his parole is thereby automatically revoked and, in that circumstance, he will be returned to his New Jersey prison. According to the petitioner's brief, the one hundred dollars

per month proviso has since been raised to thirty-five dollars a week (brief, p. 8).*

In November, 1963, the petitioner moved to set his New York sentence aside on the ground that he had been brought before the court improperly. It would therefore appear that what he is really claiming is that the New York judgment was entered by a court lacking jurisdiction. But since he is not in the custody of the New York authorities, it is patent that his application, at this stage, cannot be considered in the nature of habeas corpus. Post-judgment but pre-custody, his attack finds no vehicle as a statutory motion. By process of elimination, the petitioner's motion must be deemed an application for writ of *coram nobis*, since that is the only remedy which may now be available and it is by such designation that the Appellate Division granted leave to appeal as a poor person (order entered on November 12, 1964).

Specifically, petitioner's motion was directed at the use of the detainer compact between New York and New Jersey whereby New York obtained custody and imposed sentence. His lawyer argued that the agreement was not meant to be applied to post-conviction proceedings, and even if it was, the formalities of the interstate compact were not properly complied with. He concludes therefrom that sentence was improperly imposed and presumably hopes success will remove New York's warrant now outstanding against the petitioner in New Jersey.

* In reference to petitioner's discussion of New York's attempt to extradite him (brief, pp. 8-9), it should be noted that on September 14, 1965, the extradition proceedings were dismissed by the Hon. Jacob S. Glickenhaus of the Superior Court of New Jersey.

POINT I

Petitioner's writ was properly dismissed.

Mounting a technical attack against a sentence imposed upon him 16 months before, and which he has not yet begun to serve, the petitioner's legal structure is a creation lacking in foundation for of the only two bases available one is behind him and the other still ahead. Obviously, the petioner could have raised his objection to the means by which he was brought before the court at the time of sentence. The point, thus preserved, would then be reviewable by ordinary appeal from the judgment. This opportunity was lost. However, because of the peculiar character of the point, which is based on a claimed jurisdictional defect, a remedy may be accorded by state habeas corpus. But such action is still ahead of the petitioner who has not yet been reduced to state custody. At this moment, the petitioner's motion founders in a procedural abyss. Clearly, it has no recognizable shape as a statutory motion. And for various reasons, it fails to materialize as the friendly and powerful genie of *coram nobis*. Alas, rub though he may, Aladdin's lamp has limitations.

Basic to its power is that the wrong complained of must involve official fraud of constitutional dimension, which does not—and could not have—appeared on the record. In this case, no such fraud is claimed. Moreover, the petitioner's failure to complain at sentencing is the only reason his contention is not part of the record. Neglected remedies of the past, as well as future possible remedies, bar present resort to extraordinary avenues of relief. For, as fre-

quently noted, *coram nobis* is "an emergency measure born of necessity to afford a defendant a remedy against injustice when no other avenue of judicial relief is, or ever was, available" *People* v. *Howard,* 12 N. Y. 2d 65, 66 (1962). See also *People* v. *Brown,* 13 N. Y. 2d 201 (1963).

Even if the hospitality of *coram nobis* be extended to the petitioner's claim, his application was fatally defective. The trial court's extraordinary power to review its own actions must be invoked by an affidavit of facts by the petitioner himself. The hearsay allegations of an attorney are no substitute for this minimum earnest of good faith. The omission of such direct allegations in this case deprived the court of the initial evidence upon which relief could be predicated.

Nor is this purely an exercise in the perpetuation of legal fictions, for in the instant case one of the contentions raised is lack of proper notice to the petitioner. A hearsay affidavit should not suffice to put this in issue.

While research has uncovered no law in this state expressly requiring the petitioner's sworn allegations to initiate reveiw by *coram nobis,* no application for the writ should be entertained without them.

It has been said that "*coram nobis* will issue only at the instance of a party to the record or of one in privity with him, or to a person injured by the judgment who will derive a benefit from its being recalled. 2 R. C. L. p. 309." *Jablonski* v. *People,* 330 Ill. 422, 71 N. E. 2d 361, 363 (1947). See also *State ex rel. Cutsinger* v. *Spencer* ("the proceeding is instituted by the judgment defendant") 219 Ind. 148,

41 N. E. 2d 601, 603 (1942). These few exceptions are based in necessity. No such justification can be attributed to the innovation petitioner's counsel introduces here, and no cause has been shown for such a dramatic expansion of present procedures.

Both uniform usage and reason sanction the simple procedural prerequisite of an affidavit from the petitioner. To begin with, the most untutored prisoners regularly observe the rule and apparently have no difficulty executing the necessary application. Nor is the requirement unfair, since the dismissal of an irregular petition is no bar to another on the same grounds.

Furthermore, although as a matter of policy indictments for perjured affidavits are rarely sought, prohibiting a petitioner from proceeding unless he commits himself to a sworn statement necessarily leaves him exposed to the potent antidote of criminal prosecution for materially false assertions. Finally, it is well-settled that certain actions are insufficient in law because instituted by someone not personally familiar with the facts. A motion for summary judgment is an obvious illustration. In a similar fashion, the application below was defective on its face. This inadequacy has not, to this day, been cured.

POINT II

The court which imposed judgment upon the petitioner had jurisdiction pursuant to §669-b of the New York Code of Criminal Procedure [answering petitioner's brief].

The Agreement on Detainers (§669-b New York Code Crim. Proc.) provides, *inter alia*, for the swift and orderly transfer of prisoners between states in order to dispose of "charges outstanding". It is petitioner's contention that because of an improper application of this statute, he was "illegally" and "unlawfully" brought into New York, and therefore improperly sentenced. In so urging he slides over the fatal defect in his argument. Even assuming he was improperly spirited from New Jersey to face sentence here, more than four score of years have passed since the United States Supreme Court affirmed that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court." *Ker* v. *Illinois*, 119 U. S. 436, 444 (1886). More recently, Mr. Justice Black, speaking for a unanimous bench in *Frisbie* v. *Collins*, 342 U. S. 519, 522 (1952), observed that "This Court has never departed from the rule announced in *Ker* v. *Illinois* [cit. om.], that the power of a court to try a person for a crime is not impaired by the fact that he had been brought within the Court's jurisdiction by reason of a 'forcible abduction'." Thus, even if petitioner's contention were soundly based, it is of no legal moment, for improper removal will not vitiate an otherwise valid sentence. Indeed, the fact patterns of *Ker* and *Frisbie* are much more extreme than the "kidnaping" in the present

case. Nor is it irrelevant that the petitioner was brought here as a recently convicted felon, and not merely as one accused of a crime.

Moreover, the petitioner takes a view of the compact so narrow as to conflict with its manifest purpose. He argues that the Agreement "does not authorize a transfer of a prisoner * * * for the sole purpose of sentencing" (brief, p. 10), pointing to section 669-b of the New York Code of Criminal Procedure which provides for the interstate transfer of prisoners where there is pending in any other party state "an untried indictment" [Article IV a]. However, this provision must be read in conjunction with the direction that "This agreement shall be liberally construed so as to effectuate its purposes" [Article IX]. The purpose of Section 669-b is clear. The opening sentence of the act notes, in part, that "The party states find that charges outstanding against a prisoner * * * produce uncertainties which obstruct programs of prisoner treatment and rehabilitation" [Article I]. It is patent that the uncertainty concerning an impending sentence in a sister state can as seriously injure "treatment and rehabilitation" as an open indictment.

The memorandum of the Joint Legislative Committee on Interstate Cooperation in support of Section 669-b observes that the Agreement on Detainers provides "a standardized and simpler method" than the then presently existing methods of transfer—such as extradition and private case by case agreements; moreover, the facilitation of "the speedy disposition of all untried charges" is stressed (McKinney's Session Laws of New York, 1957, p. 2102). This same Legislative Memorandum appends, as perti-

nent, comments in support of intrastate detainer legislation [Code Crim. Proc. 669-a]. There the same committee observed *inter alia* that "the correctional authorities are unable to plan a program or rehabilitation intelligently because neither they nor the prisoner can know whether detainers lodged against the prisoner may not ultimately be exercised with resultant additional conviction and sentence" (*id.* p. 2093).

It seems apparent that the legislature did not consider the possibility of a sentence being divorced temporally from the trial itself. However, the committee's expressed concern over the effect that a pending sentence proceeding might have upon rehabilitative treatment during incarceration elsewhere leads logically to the conclusion that it is sound practice to apply the Detainer Agreement to that stage of the proceeding. Such application is certainly compatible with present penological thinking which provides that rehabilitative treatment is more effectively absorbed when the prisoner is not left to guess as to just what other punishment he might be facing.

With this in mind, the "liberal" construction directed should be adopted and "untried" indictments interpreted as "undisposed of". This "effectuate[s] its [the act's] purposes".

Petitioner's final argument is that even if the Detainer Agreement is applicable, it was unlawfully executed because he was not notified in a proper fashion, and that this failure amounted to a denial of due process (brief, p. 13). His argument is based on a prisoner's right to oppose transfer by instituting a motion to the "sending" governor.

He concludes that if he has a right to move, he necessarily has a right to know (brief, p. 13). He concedes, however, that New Jersey, unlike New York, did not require specific advisement of his right to go to the executive (brief, p. 13).

But his theory overlooks the fact that on April 28, 1962, petitioner was notified "that a Detainer (Bench Warrant) had been lodged against him by New York" (Affid. of George J. Malinsky, October 31, 1963, p. 7, ¶17) and that the petitioner thereon refused to consent to transfer (*id.* pp. 7-8, ¶19). Certainly this is notification. What petitioner is apparently complaining of is that nobody detailed for him the legal steps he should follow to delay or avoid being sent to New York. But, surely, this is not the state's obligation.

Moreover, his entire argument assumes a hypothetical aura when it is realized that to this day he has never pretended to have a contention of such validity that it would have prevented his transfer. And finally, it should not be forgotten that while the petitioner had the expressed statutory right "to contest the legality of his transfer", when he appeared at sentence in this state—represented by eminent counsel—he failed to do so. He cannot be heard to complain at this late date.

His complaint that counsel was not available to him at the New Jersey hearing preceding his transfer is without legal significance. That proceeding was merely a preliminary to the sentence; whatever aggrievance he may have felt could have been pressed by counsel at the sentence itself, which occurred the following day. None was forthcoming.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

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October, 1965